Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
3 October 2017
English
Original: French

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 654/2015*, **

Communication submitted by:	Rached Jaïdane, represented by Track Impunity Always (TRIAL) and Action des chrétiens pour l'abolition de la torture (ACAT-France)
Alleged victim:	The complainant
State party:	Tunisia
Date of complaint:	7 January 2015 (initial submission)
Date of present decision:	11 August 2017
Subject matter:	Torture and ill-treatment by State authorities
Procedural issues:	None
Substantive issues:	Torture; cruel, inhuman or degrading treatment or punishment; measures to prevent the commission of acts of torture; systematic surveillance of the custody and treatment of detained persons; the obligation of the State party to ensure that the competent authorities proceed to a prompt and impartial investigation; the right to complain; the right to redress; the prohibition on the use in proceedings of statements made as a result of torture
Articles of the Convention:	1, 2 and 11 to 16

1.1 The complainant is Rached Jaïdane, a Tunisian national born on 25 March 1963 in Tunis. He claims to be the victim of a violation by Tunisia of articles 1, 2 and 11 to 16 of the Convention. He is represented. The Convention entered into force for Tunisia on 23 October 1988.

1.2 On 27 January 2015, in accordance with rule 114 (1) of its rules of procedure, the Committee requested the State party to adopt effective measures, during the consideration of the complaint, to prevent any threats or acts of violence to which the complainant and his family might be exposed, particularly as a result of having lodged the present complaint, and to keep the Committee informed of the measures taken with that end in view.

* Adopted by the Committee at its sixty-first session (24 July-11 August 2017).

** The following members of the Committee participated in the examination of the present communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sebastien Touzé and Kening Zhang.

The facts as submitted by the complainant

2.1 The complainant is a mathematics teacher at the Hay Khadra secondary school in Tunis. In 1993, while he was a university lecturer in France, the complainant went to Tunisia to attend his sister's wedding. On 29 July 1993, at around 2 a.m., when he was staying at his aunt's residence, about 15 State security officers in civilian clothes turned up in the middle of the night, without a warrant, and arrested him in front of his family. The officers also searched the complainant's room and seized his passport and 2,000 dinars that he was intending to offer his sister as a wedding gift. As he was suspected of fomenting a coup against the Rassemblement Constitutionnel Démocratique (Democratic Constitutional Rally), which was then the ruling party, he was handcuffed, taken to the Ministry of the Interior and interrogated about the purported attack, as well as his alleged links with Salah Karker, a leader of the Ennahda party exiled in France.

Custody, interrogation and acts of torture

2.2 On arriving at the Ministry of the Interior, the complainant was escorted to a plush office with padded doors on the fourth floor. A.S., accompanied by an officer, was seated behind the desk. He introduced himself as the Director of National Security, without revealing his name, and then asked the complainant "where the bombs were hidden". The latter replied that he had no knowledge of a bomb cache and that he had simply come to attend his sister's wedding. The exchange lasted for two minutes and A.S. then threatened to fetch his sister. Rached Jaïdane insulted him, and the Director of National Security nodded to an officer, who took the complainant to another room, where Mohamed Koussai Jaïbi was introduced to Rached Jaïdane as one of his alleged accomplices. Mohamed Koussai Jaïbi was lying on the ground with his clothes torn and his face bleeding and swollen. His feet were bare, his bleeding right foot was apparently broken and he had bruises on his hands.[1] There were about six officers in the room. They ordered Mohamed Koussai Jaïbi to state that Rached Jaïdane's assignment was to put him in contact with Salah Karker, a militant of the Ennahda Islamist movement who was in exile at the time in France. A dozen officers then took Rached Jaïdane into another room on the same floor.

2.3 The complainant underscores that the Ministry's teams of officers then took turns in subjecting him to acts of torture for 17 hours. The officers asked him questions accompanied by threats of torture and death. Rached Jaïdane, on receiving a first slap on the neck, turned round and spat at the officer. By way of retaliation, all the officers present punched him and beat him with truncheons and batons for several minutes. He was then taken to another room with a chair and two desks on which they had placed a wooden pole. The officers ordered him to remove his clothes. When he refused, they undressed him by force, leaving him in his underpants. They hit him, beat him with a truncheon and administered electric shocks to his abdomen. He was suspended on the pole, which was tied to his ankles and wrists with pieces of cloth. He was then beaten in this position for about 30 minutes by a person called Belgacem, nicknamed "Bokassa". Other detainees informed him later that they had been subjected to torture by the same person.

2.4 The complainant managed to loosen the bonds and fell to the floor. The officers began to hit him again, especially on the nails (he still has a scar on his right thumb); they crushed cigarettes on several parts of his body, including one of his hands and his genitalia. They then penetrated his anus with a stick, saying: "There you are, we pushed it in; do you think that you're a man?" The officers also threatened to bring in his sister and rape her. Rached Jaïdane lost consciousness twice. The victim was allowed to pray at 12.30 p.m. in the "roast chicken" position, after promising his torturers that he would confess everything. Belgacem then made him sit down and brought him coffee. Rached Jaïdane pulled himself together and dealt him a blow. Belgacem retaliated and the torture resumed. The officials brought in an iron basin. The detainee was handcuffed behind his back. Two officers, nicknamed Gatla and Fil[2] respectively, entered the room. They plunged Rached Jaïdane's head into the basin several times. When he started to drown, Fil sat on his stomach to make

[1] The complainant encloses a copy of Mr. Koussai Jaïbi's complaint of torture, which contains a detailed account of the torture that he suffered.

[2] An Arabic word meaning "elephant", with reference to the person's striking corpulence.

him cough up water. They put the detainee back in the roast chicken position and proceeded to strike him, particularly on the sexual organs. The torture session continued until about 7.45 p.m.

2.5 At the end of the day, Rached Jaïdane finished writing a dictated confession, in which he admitted to having been trained in the martial arts at the Parisian faculty of Jussieu, to knowing Mohamed Koussaï Jaïbi, and to having reached an agreement with the Islamist opponent Salah Karker.

2.6 At about 7.45 p.m., Rached Jaïdane was taken down to cell No. 8 located in the basement of the Ministry. The cell, which measured about 3.5 by 4 metres, contained a mattress and a hole in the floor which served as a toilet. The complainant shared the cell for several days with a fellow detainee. During the subsequent 20 days in custody, Rached Jaïdane continued to be beaten with fists and clubs and to be subjected to threats with a view to compelling him to sign a new series of confession statements. The abuse was less severe than that inflicted during the first 17 hours of custody. One of the officers told Rached Jaïdane that it was thanks to the doctor's intervention that the abuse had diminished after the first day. The detainee had lost consciousness several times on the day after his arrest and could not remember having seen a doctor.

2.7 The torture ceased on the twentieth day of custody for reasons unknown to Rached Jaïdane. On the thirtieth day, an official working for the Intelligence Service, a childhood friend of Rached Jaïdane, came to the custody wing of the Ministry of the Interior to bring in a new detainee. He recognized Rached Jaïdane and came over to talk to him. He requested that the complainant should see a doctor, but the nursing officer, nicknamed "Sabromicine", simply gave him analgesics and betadine to disinfect his wounds. Rached Jaïdane remained in detention at the Ministry of the Interior from 30 July to 4 September 1993, the date of his first appearance before an investigating judge. He was arbitrarily detained for 37 days and maintained in custody for far longer than the legally prescribed period. The Code of Criminal Procedure that was in force at the time limited custody to four days, a period that was renewable once and could be extended by two additional days in exceptional circumstances. The maximum period was thus 10 days. Moreover, the failure to notify his family of his detention at the Ministry of the Interior constituted a breach of the Code of Criminal Procedure. He remained in incommunicado detention in the Ministry, which is not an official detention centre.

The trial

2.8 On 4 September 1993, after 37 days in custody at the Ministry of the Interior, Rached Jaïdane was taken to the Ariana court of first instance together with his fellow detainee. The two of them encountered another alleged accomplice in the court cells. He had also been tortured at the Ministry of the Interior, at the instigation of the same officers.[3] The detainees were brought before a first investigating judge, Mostafa Mbazaa, who was shocked by their condition and refused to take the case, invoking the lack of evidence. The three detainees were placed in pretrial detention on the same day in the 9 April Prison. Rached Jaïdane still bore traces of torture on arriving at the prison.

2.9 With a view to backing up the custody file, Rached Jaïdane was returned to the Ministry of the Interior on 20 September 1993 for interrogation by two officers. He signed the interrogation record under threat of further torture.[4] A few days later, he was returned to the court with the other accused and they appeared, one by one, before the third investigating judge. Rached Jaïdane still bore traces of torture, including a cigarette burn on his left hand and evidence of an extracted right thumbnail. He was still limping and bleeding from the anus because of the rape he had suffered while in custody. Judge Ben

[3] The complainant attached a witness statement by Mr. Koussai Jaïbi, describing the state in which he discovered Rached Jaïdane on that day, bearing visible signs of torture.

[4] According to the record, the complainant allegedly stated, inter alia, that he had joined the Ennahda party in the early 1980s, that he had distributed party leaflets, and that, on settling in Paris in the 1990s, he had established ties with an individual who would become a close ally, and who would keep him informed and involve him in actions aimed at toppling the existing regime and installing an Islamist regime through armed revolutionary action.

Aïssa, who happened to be a distant relative of Rached Jaïdane, told the latter that he was unable to report the torture because he would end up in prison himself.

Conviction and sentence

2.10 On 30 May 1996, after three years in pretrial detention, Rached Jaïdane was sentenced, together with 11 co-defendants, to 26 years' imprisonment for an attempted attack aimed at changing the Government (art. 72 of the Criminal Code) and for conspiracy (arts. 131 and 132) by the Criminal Division of the Court of Appeal of Tunis ruling at first instance. They were accused of having fomented an attack on the congress of the Rassemblement constitutionnel démocratique, the ruling party, on hotels and on the synagogue of Djerba, and of having planned to kidnap the daughter of the Minister of the Interior and the daughter of Ben Ali. They were all convicted following an expedited 45-minute trial based on confessions obtained through torture. As an appeal in criminal proceedings could not be lodged under Tunisian law prior to the year 2000, the convicted persons filed an appeal in cassation. Their appeal was dismissed the following month.

Conditions of detention while serving the sentence

2.11 Rached Jaïdane was detained successively in the following prisons: 9 April Prison from 1993 until the end of 1997; Nadhor Prison from 1997 to 1998; Borj Erroumi Prison from 1998 to 1999; Mahdia Prison from 1999 to 2001; Monastir Prison from 2001 to 2002; Gabès Prison from 2002 to 2003; and Borj Erroumi Prison from 2003 to 2006. His family was not allowed to visit him in prison until December 1993. He was repeatedly subjected to solitary confinement during his detention, sometimes for very long periods. At 9 April Prison, where he was placed in pretrial detention after being held in custody at the Ministry of the Interior, he was placed in an isolation cell on numerous occasions for periods ranging from 10 to 45 days as punishment for asserting his rights. He was placed in a cell measuring about 3 by 3 metres, sometimes alone and sometimes with other detainees. The cell contained no bed or blanket and only a hole for use as a toilet. The detainees were provided with only one piece of bread per day. They were denied access to showers and were not allowed out for a walk. When he was alone, Rached Jaïdane was usually chained to the wall by his left leg and right wrist. During the last 30 months of his detention in 9 April Prison, he was held in solitary confinement, alone in a room measuring 3 by 2.5 metres. He was allowed out, separately from other prisoners, only twice each day for between 5 and 10 minutes. Thus, as a result of repeated placement in isolation cells and 30 months of solitary confinement, Rached Jaïdane spent about four years in solitary confinement in the E wing of 9 April Prison. He frequently heard cries from prisoners who were tortured or chained to the bars of their cell door. He was able to communicate through the door with several other Islamist detainees held in solitary confinement.

2.12 When he was not placed in solitary confinement or in an isolation cell, Rached Jaïdane was successively placed in several overcrowded cells in which the majority of the prisoners slept on the floor, between the beds or even under the beds. One of the most overcrowded cells, which was known as the "Karaka" and was located in the G wing, accommodated about 400 prisoners who shared only two toilets. Like other prisoners of conscience, Rached Jaïdane was often deprived of his weekly shower.

2.13 In addition to the deplorable conditions of detention, Rached Jaïdane was repeatedly tortured during his detention in 9 April Prison. Each placement in the isolation cell was preceded by a torture session, during which guards beat his entire body with batons, plastic pipes and kicks. On each occasion they stretched him out on the ground, tied up his wrists and ankles, and struck the soles of his feet with a truncheon or a plastic tube before locking him up in the isolation cell. During two of the sessions, Rached Jaïdane lost consciousness. He awoke with a prison doctor by his side, nicknamed "the Serb", who made sure that he had no fractures but never provided any care. The abuse and placement in isolation cells were escalated for several months.

2.14 At the end of 1994, Rached Jaïdane was assaulted by the head of one of the prison wings. He insulted the detainee, who returned the insult. In retaliation, the prison guard stripped the detainee naked, handcuffed him to the door of one of the isolation cells, beat him from head to foot with a wooden stick for about an hour, and then placed him in a cell

measuring 3 by 3 metres, without a window, where there were already 17 inmates. The detainees took turns sleeping, without a bed or a blanket, for 10 days. They were unable to take a shower or to go for a walk, and they were entitled to only one piece of bread per day. Rached Jaïdane was retained in the cell for 30 days.

2.15 The complainant was again assaulted in 1996 to punish him for writing a letter to Ben Ali. Four officers tied him in the roast chicken position and beat his entire body, including his genitals and the soles of his feet (*falaqa* torture). The blows had serious after-effects, including a problem in his right eye, which was not operated upon until five years later. His right arm and his nose were also broken and he received no immediate treatment. A fellow inmate produced a plaster composed of toothpaste and breadcrumbs to relieve his broken arm.

2.16 Rached Jaïdane did not see the 9 April Prison doctor until he went on hunger strike. The doctor visited him to dissuade him from continuing. He was hospitalized on several occasions during his detention: in 1996 for a mild heart attack; in 1997 on account of a hunger strike; and twice in 2001 for an operation on the eye that had been damaged by torture.

2.17 In the other prisons in which he was subsequently detained, Rached Jaïdane was once placed in solitary confinement for five months in Nadhor Prison and was repeatedly placed in an isolation cell. As in 9 April Prison, he had no bed or blanket during any period in the isolation cell, he ate only one piece of bread each day, and he was unable to take a shower or go for a walk. The cells were devoid of windows except for the isolation cell in Mahdia Prison. Each period in an isolation cell lasted for 7 to 15 days. All in all, he spent 7 days in an isolation cell in Nadhor Prison, about 40 days in Borj Erroumi Prison, 20 days in Mahdia Prison, 15 days in Monastir Prison and 10 days in Gabès Prison. One of the periods in an isolation cell during his first incarceration at Borj Erroumi Prison was preceded by a torture session similar to those to which he had been subjected before being placed in an isolation cell in 9 April Prison.

Release and after-effects of the torture

2.18 Rached Jaïdane was released in February 2006 after 13 years of torture and ill-treatment in Tunisian prisons. He continues to suffer severe physical and psychological after-effects of the torture, which have entailed a disability rate of 35 per cent. He suffers, among other after-effects, from an implosion of the right eye, a deviation of the nasal pyramid, buzzing in the ears, positional vertigo, multiple dental fractures, aggravation of a hernia and a varicocele, and post-traumatic neurosis (a medical assessment is attached). Rached Jaïdane is unable to father a child because of several of these pathologies.

Measures taken to secure justice

2.19 On 3 June 2011, Rached Jaïdane filed a complaint of torture against several Ministry of the Interior officials and prison administration officers, and against the judge who convicted him at first instance. The investigating judge at the Court of First Instance in Tunis to whom the case was referred ordered a medical assessment, which was conducted on 4 October 2011. The forensic medical examiner assessed the rate of permanent disability resulting from the torture at 35 per cent.

2.20 The complainant stresses that the investigating judge failed to undertake a diligent investigation, since he did not seek to identify all the perpetrators of acts of torture and potential witnesses, nor did he endeavour to ascertain, for instance in the archives of the Ministry of the Interior, the exact role and prerogatives of each official employed at the time by the Ministry of the Interior and the State Security service. Furthermore, the judge decided to refer the case to the Correctional Chamber of the Court of First Instance in Tunis rather than to the Criminal Chamber. As the crime of torture did not exist in the Criminal Code at the material time, the investigating judge decided to prosecute the persons accused of the acts committed against Rached Jaïdane for the less serious offence of assault based on article 101 of the Criminal Code.

2.21 The trial opened before the Correctional Chamber of the Court of First Instance in Tunis in April 2012. Notwithstanding the requests of the victim's lawyer, the Chamber

refused to withdraw from the case by redefining the offence as a crime. Moreover, since the opening of the proceedings, the trial has been repeatedly deferred, either at the request of the defence, which has been trying to gain time, or because of the absence of one of the accused from the hearing, allegedly on account of ill-health or simply because of a downright refusal to appear in court. All requests for postponement of hearings have been accepted. Furthermore, the complainant was contacted several times by relatives of the accused who tried to persuade him to withdraw his charges. More recently, he began to receive anonymous phone calls threatening to return him to prison.

Conclusions concerning the requirement of exhaustion of domestic remedies

2.22 According to the complainant, he sought to pursue available domestic remedies, but they proved ineffective and fruitless,[5] since no effective investigation was undertaken into the torture suffered. He points out that he repeatedly complained of the torture suffered during his custody, initially to the first investigating judge before whom he appeared on 4 September 1993, after 37 days of arbitrary detention and torture at the Ministry of the Interior. The judge refused to take the case because of the deplorable state of the accused and the weakness of the case file submitted against them. Rached Jaïdane reiterated his complaints during his appearance before the second investigating judge in late September 1993, but they were ignored. During both interviews with the investigating judges, Rached Jaïdane bore clear traces of torture. Despite his allegations and visible traces of torture, the two judges failed to report the crime. The torture continued throughout his 13 years of imprisonment. It was only after the revolution that Rached Jaïdane finally hoped to secure justice for the ill-treatment he had suffered. He filed a complaint with the Court of First Instance in Tunis on 3 June 2011 and finally secured the opening of an investigation, which closed on 16 February 2012. However, the third investigating judge at the Tunis Court, when presented with the case file, failed to undertake a diligent investigation, as already noted. The victim is clearly confronted with passivity on the part of the Tunisian authorities and an obvious lack of due diligence in handling the case.

2.23 The complainant adds that it may be concluded from the general climate of impunity that still prevails in Tunisia for serious violations of human rights, including acts of torture, that he is unlikely to win his case before the national courts. The shortcomings of the judicial system have a disquieting impact on the prosecution of serious crimes, including acts of torture. In light of the outcome of all the steps taken by Rached Jaïdane to secure justice, the complainant requests the Committee to confirm that he sought to pursue available domestic remedies but that they proved to be objectively ineffective, partial and futile, and that reasonable time limits were exceeded.[6] More than 21 years after the facts, the case has still not been considered with a view to prosecuting and punishing the alleged perpetrators. In light of the Committee's jurisprudence, such a delay is manifestly excessive. Accordingly, the delay of more than 18 years in launching an investigation into the allegations of torture, and the period of more than 35 months that elapsed from the beginning of the legal proceedings without an effective examination of the case leading to the prosecution and punishment of all perpetrators, and to reparations for the victim, constitute unreasonable delays justifying the non-exhaustion of domestic remedies.

The complaint

3.1 The complainant alleges that articles 1, 2 (1), 4, 11, 12, 13, 14, 15 and 16 have been violated.

[5] Communication No. 59/1996, *Blanco Abad v. Spain*, Views adopted on 14 May 1998, para. 8.8. See also communications Nos. 368/2008, *Sonko v. Spain*, decision adopted on 25 November 2011, para. 10.7; and 261/2005, *Osmani v. Serbia*, decision adopted on 8 May 2009, para. 10.7.

[6] The complainant refers to the case of *Blanco Abad v. Spain*, in which the delay of 19 days before launching an investigation and the period of 10 months taken to conduct the investigations were deemed to be excessive by the Committee.

The definition of torture (article 1)

3.2 According to the complainant, the acts to which he was subjected constitute torture, within the meaning of article 1 of the Convention. Rached Jaïdane was undoubtedly subjected to extremely severe abuse that caused acute suffering and was subjected to numerous acts of torture, both at the Ministry of the Interior and during his 13 years of imprisonment (see paras. 2.3 ff. for the period of custody and paras. 2.13 ff. for the torture inflicted during post-conviction detention). He continues to suffer severe physical and psychological after-effects of the torture to which he was subjected.

3.3 The intention of Rached Jaïdane's torturers to subject him to acute suffering is obvious. The coordinated nature of the torture inflicted on the persons concerned unambiguously reveals that the torturers took deliberate action with the aim of obtaining confessions. The abuse inflicted on Rached Jaïdane in prison was designed to punish him for claiming his rights. The acts of torture were undoubtedly inflicted by State officials (the State Security service at the Ministry of the Interior, with the complicity of the then Minister of the Interior and the Director of National Security in the same Ministry). According to the complainant, the two investigating judges who saw the victim during the month following his detention and refrained from reporting the facts were also accomplices. The torture inflicted in prison was carried out by prison administration officers and managers, who were probably operating with the consent of the prison directors and deputy directors.

3.4 The complainant adds that he was held incommunicado during his 37 days of detention in the Ministry of the Interior in 1993, which also constitutes a violation of article 1.[7] His family was not notified of his custody, let alone of his place of detention. The Ministry of the Interior was not — and is still not — an official place of detention.

3.5 The complainant was subjected to conditions of detention constituting torture, as described above in paragraph 2.11 and following paragraphs.[8]

Effective measures to prevent acts of torture (article 2 (1))

3.6 According to the complainant, a number of procedural safeguards applicable to all cases of deprivation of liberty were not respected. He remained incommunicado in the Ministry of the Interior from 30 July to 4 September 1993, the date of his first appearance before an investigating judge, that is to say for 37 days. His custody thus lasted for much longer than the maximum period authorized by law at the time. Moreover, his family was not notified of his detention at the Ministry of the Interior and he did not have access to a doctor, in violation of the Code of Criminal Procedure. In addition, he did not receive the assistance of a lawyer because persons in police custody are not guaranteed the right to legal aid under Tunisian law. Rached Jaïdane was thus arbitrarily detained in the Ministry. After appearing before a first investigating judge on 4 September 1993 and before the 9 April Prison administration on the same day, with visible traces of torture, he was returned to the Ministry of the Interior on 20 September and was compelled to sign records under threat of further torture. His pretrial detention continued for nearly three years, which constitutes an unreasonable delay. The Tunisian authorities therefore repeatedly violated article 2 (1) of the Convention.

3.7 The complainant adds that torture was not criminalized under the Tunisian legal system at the material time and that it was not until 1999 that the Criminal Code incorporated the crime of torture. He adds that the definition of torture is not in conformity with the Convention. Article 101 bis, which was introduced into the Tunisian Criminal Code in 1999, was amended after the revolution by Legislative Decree 106 of 22 October

[7] Communication No. 402/2009, *Abdelmalek v. Algeria*, decision adopted on 23 May 2014, paras. 11.3 and 11.4.

[8] Referring, in particular, to a shadow report submitted by the International Federation for Human Rights in connection with the consideration of the second periodic report of Tunisia in 1998, the complainant underscores that, at the time of his imprisonment, deprivation of care, incommunicado detention, and placement in isolation cells under unhealthy conditions were commonplace, especially in the case of political prisoners. Several prisoners died in custody because of lack of care.

2011, allegedly to promote the elimination of the phenomenon of torture. The resulting definition of torture is even further removed than the previous one from the international definition contained in the Convention against Torture.[9] Acts of torture committed prior to the introduction of article 101 bis into the Criminal Code in 1999 should not, in theory, be prosecuted owing to the applicability of the principle of non-retroactivity of criminal law. However, article 148 (9) of the new Constitution stipulates that, for crimes under the transitional justice system, including torture, "the invocation of the non-retroactivity of laws, the existence of a prior amnesty, the authority of res judicata, or the applicability of the statute of limitations to the crime or punishment is considered inadmissible".

Measures to ensure that acts of torture are offences under criminal law and are punishable by appropriate penalties (article 4)

3.8 According to the complainant, the judge should have characterized the acts as violations of articles 250 and 251 of the Criminal Code on account of the complainant's arbitrary detention. Article 250 stipulates that: "Any person who unlawfully apprehends, arrests, detains or illegally confines another person shall be liable to a penalty of 10 years' imprisonment and a fine of 20,000 dinars." Article 251 specifies the following aggravating circumstances: "The penalty shall be 20 years' imprisonment and a fine of 20,000 dinars: (a) if the apprehension, arrest, detention or illegal confinement is accompanied by violence or threats. [...] The penalty is life imprisonment if the apprehension, arrest, detention or illegal confinement lasts for more than one month or results in physical disability or illness; if the operation is intended either to prepare or facilitate the commission of a serious crime or other major offence, or to enable the perpetrators and accomplices of a serious crime or other major offence to flee or escape punishment; or if the purpose is to secure compliance with an order or condition, or to damage the physical integrity of the victim or victims." According to the complainant, these legal definitions are not entirely consistent with article 4 of the Convention. As the acts are defined as a "major offence", the defendants are liable to a maximum of 5 years' imprisonment, which appears to be quite a lenient penalty in the light of the seriousness of the acts.

Systematic review of rules (article 11)

3.9 According to the complainant, the Tunisian authorities manifestly failed to conduct the necessary oversight of his treatment, given his critical condition following the interrogation. In addition, there were several procedural irregularities, including: incommunicado detention in the Ministry of the Interior for 37 days; custody exceeding the maximum period; failure to inform his family and denial of access to medical care; lack of legal assistance, since Tunisian law fails to guarantee that right to persons held in police custody; and de ention in an unrecognized place of deprivation of liberty.

3.10 Furthermore, during his 13 years of incarceration, he was repeatedly denied the right to receive visits from his family. He was detained on 4 September 1993 but only received his first family visit in December of that year. He was subsequently denied the right to visits whenever he was placed in solitary confinement. His right to be examined by a doctor in prison was not respected. The doctors whom he saw on rare occasions merely verified that he had suffered no fracture after two beating sessions or visited him on several occasions to persuade him to end his hunger strikes. As they never treated him, Rached Jaïdane had to be hospitalized several times during his incarceration, sometimes in a critical condition.

A prompt and impartial investigation (article 12)

3.11 The complainant also invokes article 12, stressing that the judicial authorities were informed of the acts of torture inflicted on Rached Jaïdane at the end of his period of custody on 4 September 1993, when he appeared before a first investigating judge after 37 days of arbitrary detention and torture at the Ministry of the Interior. Rached Jaïdane reiterated his complaints when he appeared before the second investigating judge at the end

[9] See, in this regard, the Committee's concluding observations concerning the third periodic report of Tunisia (CAT/C/TUN/CO/3).

of September. During the two interviews with the investigating judges, he bore clear traces of torture. Yet the two judges failed to report the crime and to order an expert medical opinion.

3.12 As he lodged his complaint with the Court of First Instance in Tunis on 3 June 2011 and the investigation was closed on 16 February 2012, it cannot be concluded that an investigation of the facts was immediately initiated or that it was prompt and impartial, since more than 21 years elapsed from the date on which the facts were first reported without an effective investigation and prosecution of the alleged perpetrators. The legal definition adopted by the investigating judge was a simple offence of violence. The trial was opened in April 2012 and the hearings have already been postponed on 15 occasions. This demonstrates a lack of will on the part of the judiciary to render justice to the author of the complaint.

A prompt and impartial examination of the allegations (article 13)

3.13 The complainant adds that a violation of article 13 of the Convention should be found on the same grounds as those invoked in the case of article 12.

The right to redress (article 14)

3.14 With regard to article 14, the complainant points out that a number of procedural safeguards pertaining to his detention were not respected. Moreover, the Tunisian State, having deprived him of criminal proceedings as set out above, deprived him, in addition, of the prescribed legal procedures for obtaining compensation for material and non-material damages due to serious crimes such as torture.

3.15 On 15 March 2012, Rached Jaïdane submitted a claim for compensation to the Ministry of Human Rights and Transitional Justice, which no longer exists today, based on the amnesty certificate issued to him after the revolution as a former unjustly convicted political prisoner. He never received a reply. Moreover, he has not benefited from any rehabilitation measure, and is still suffering from both physical and psychological after-effects owing to the lack of any proper treatment for his condition.[10]

3.16 In January 2013, Rached Jaïdane was recruited as a mathematics teacher at the Hay Khadra secondary school in Tunis, on the basis of Act No. 2012-4 of 22 June 2012, which grants amnestied former political prisoners or their successors in title the right to apply for a public service post within six months. The complainant underscores, however, that such recruitment is not sufficient to fulfil the State party's obligations under article 14 of the Convention.

Non-utilization of statements obtained through torture (article 15)

3.17 Referring to the Committee's jurisprudence,[11] the complainant states that he was placed in pretrial detention and sentenced to 26 years' imprisonment on the basis of his confession. Notwithstanding his allegations of torture, the conditions under which the official record was filed were never verified by the authorities and the confessions were not rendered null and void.

Cruel, inhuman or degrading treatment or punishment (article 16)

3.18 It is firmly maintained that the violence inflicted on Rached Jaïdane constitutes torture, in accordance with the definition contained in article 1 of the Convention. However, should the Committee consider that this characterization is not applicable, it is maintained as a subsidiary contention that the abuse suffered by the victim definitely constitutes cruel, inhuman or degrading treatment.

[10] Certificate in the case file.

[11] Communication No. 193/2001, *P.E. v. France*, para. 3.4. See also communication No. 514/2012, *Niyonzima v. Burundi*, decision adopted on 21 November 2014.

Request for interim measures

3.19 The complainant, referring to the Committee's concluding observations,[12] states that since his filing of the complaint on 3 June 2011, relatives of the accused have ordered him to withdraw it or to abandon his charges. In October 2014, he received anonymous calls threatening to return him to prison. Some of those responsible for the acts of torture still apparently enjoy considerable power and means of exerting pressure. Mention may be made, in particular, of the greatly feared former Director of State Security, who was prosecuted in absentia. As he was suspected of involvement in several torture cases that were being investigated, he was sentenced to 5 years' imprisonment at the end of a trial,[13] on 14 November 2011, but he has recently been released. He is considered to be on the run, but he is apparently still in Tunisia and exerts considerable influence on the police. Similarly, the Director of Borj Erroumi Prison currently occupies a high-level post in the prison administration. Hence the complainant legitimately fears reprisals.

3.20 The complainant therefore requests the Committee for protective measures to ensure that he does not suffer irreparable damage, and for steps to guarantee protection of the archives of the Ministry of the Interior, the Ministry of Justice and the prison administration, which could prove useful in seeking the truth.

State party's observations on admissibility and on the merits

4.1 In its observations of 31 July 2015, the State party notes that the complainant filed a complaint against a number of individuals, including former President Zine el Abidine Ben Ali, for acts of torture to which he was subjected. The complaint was registered in the Public Prosecutor's Office of the Court of First Instance as number 7028088/011 on 3 June 2011. The Public Prosecutor's Office authorized the opening of a provisional investigation by the first investigating judge at the Court of First Instance in Tunis. The judge characterized the acts as the crime of use of serious violence without a legitimate ground by a public official in the performance of his duties, pursuant to article 101 of the Criminal Code; the judge then referred the case to the Correctional Chamber of the Court of First Instance in Tunis for prosecution. The complainant appealed against the order to close the investigation. At the hearing on 8 April 2015, the Court of First Instance in Tunis sentenced the accused Zine el Abidine Ben Ali to 5 years' imprisonment for using violence against persons in the course of, or in connection with, his duties without lawful cause; he was also ordered to pay the costs of the criminal proceedings. With regard to the charges filed against the other defendants, the court ruled that the time limit for prosecution had expired.

4.2 According to the State party, the complainant has not exhausted domestic remedies, since the case is still pending before the Court of Appeal and an appeal in cassation may be filed against the ruling of the Court of Appeal.

4.3 With regard to the merits of the case, the State party underscores, as a subsidiary point, that the Public Prosecutor authorized the opening of a provisional investigation at the Court of First Instance in Tunis as soon as the complainant lodged his complaint with the Public Prosecutor's Office. After completing the necessary inquiries, the Court ordered the closure of the investigation and referred the accused to the Correctional Chamber of the Court of First Instance in Tunis for the initiation of proceedings relating to the charges that were deemed to be admissible. Zine el Abidine Ben Ali was convicted. Moreover, the complainant, who appealed against the initial judgment, has not exhausted domestic remedies.

Complainant's comments on the State party's submission

5.1 On 25 August 2016, the complainant highlighted the futility of available domestic remedies in Tunisia and the failure to observe reasonable time limits. He claims that the development that has occurred since the referral of the complaint to the Committee, namely the ruling of the Court of First Instance in Tunis which was handed down on 8 April 2015, confirms these two findings.

[12] Report of the Committee against Torture (A/54/44), chap. IV, para. 78.

[13] Trial concerning the victims of Barraket Essahel.

5.2 The trial before the Correctional Chamber of the Court of First Instance began in April 2012 and continued for three years. The complainant lodged an appeal, which had still not been considered by July 2016.[14] The complainant therefore requests the Committee to conclude that the proceedings have exceeded reasonable time limits. Moreover, the ineffectiveness and futility of domestic remedies are rendered more manifest by the Court of First Instance ruling that the acts are statute-barred and can no longer be prosecuted.

5.3 The complainant concludes that the Tunisian courts have violated articles 2, 4 and 14 of the Convention by refusing to prosecute his torturers on the ground that the acts are statute-barred due to their legal definition as the offence of violence, which is statute-barred after three years.

5.4 The author stresses that the definition is based on two factors, the first of which is the non-retroactivity of article 101 bis of the Tunisian Criminal Code, which criminalizes torture, and which was not adopted until 1999. Prior to the adoption of Act No. 98 of 1999, the crime of torture was not punishable as such, but simply as a form of violence, pursuant to article 101 of the Criminal Code (see para. 2.21 above). It follows that the use of violence by a public official was classified as a major offence and not as a serious crime. Act No. 98 introduced article 101 bis, which states that "any public official or person of comparable status who subjects a person to torture in the performance of or in connection with his or her duties shall be liable to 8 years' imprisonment".

5.5 In light of the principle of non-retroactivity of criminal law,[15] an accused person may be convicted only on the basis of a law applicable at the time he committed the offence, with the sole exception of the principle of *lex mitior*, i.e. application of the most lenient law, even if the latter entered into force after the infringement. In the present case, as article 101 bis of the Criminal Code provides for harsher penalties than article 101, it cannot be applied retroactively to violence committed by public officials before 1999.

5.6 The complainant reiterates on these grounds that the failure to criminalize torture prior to 1999, despite the ratification of the Convention by Tunisia in 1988, constitutes a violation of article 4 of the Convention. He adds that the definition of the offence of violence adopted in the case is due to a lack of due diligence, and probably also to a lack of independence and impartiality of the judiciary.

5.7 Notwithstanding the requests of the victims' lawyers, the judges maintained that, given the public status of the perpetrators, the application of article 101 of the Criminal Code was mandatory.

5.8 Article 218 of the Criminal Code stipulates that any person, and therefore not necessarily a public official, who intentionally injures, beats or commits any other form of violence or assault, is liable to 1 year of imprisonment and a fine of 1,000 dinars and, if the violence or assault is premeditated, to 3 years' imprisonment and a fine of 3,000 dinars. Article 219 adds that when the violence in question is followed by mutilation, loss of the use of a limb, disfigurement, infirmity or permanent disability of 20 per cent or less, the suspect is liable to 5 years' imprisonment, and to 10 years of imprisonment if the violence in question results in permanent disability of over 20 per cent. In the latter case, as the sentence exceeds 5 years, jurisdiction lies with the criminal chamber rather than the correctional chamber of the court.

5.9 The issue of the victim's disability as an aggravating circumstance is not addressed in article 101 of the Criminal Code, which deals solely with violence perpetrated by public officials. The paradox lies in the fact that article 101 provides for a harsher penalty than article 218 on the ground that the perpetrator's status as a public official constitutes an aggravating circumstance. However, the penalty prescribed by article 101 is more lenient

[14] On 21 June 2017, counsel for the complainant informed the secretariat that the appeal proceedings continued to be postponed, on each occasion at the request of the accused. The next hearing is scheduled for 25 October 2017 and will probably result in a further postponement, according to counsel for the complainant.

[15] A principle enshrined in article 1 of the Tunisian Criminal Code: "No one shall be punished save by virtue of a provision of a pre-existing law. If, following the commission of the act but prior to the final judgment, a law that is more favourable to the accused is enacted, this law shall be applied."

than that prescribed by article 219, which provides for aggravating circumstances that are not taken into account by article 101. Consequently, by virtue of their status as officials, the perpetrators of the acts of torture in the present case are not liable to the harsh penalties prescribed by article 219 which would be applicable if they were not public officials.

5.10 In addition, the judges implicitly rejected another legal definition in article 250 of the Criminal Code, which stipulates that: "Any person who unlawfully apprehends, arrests, detains or illegally confines another person shall be liable to a penalty of 10 years' imprisonment and a fine of 20,000 dinars." Rached Jaïdane was arrested without a warrant and held in incommunicado detention in the Ministry of the Interior for several weeks, in violation of the Code of Criminal Procedure.

5.11 Invocation of the definition of violence is fraught with consequences inasmuch as the offence of violence is statute-barred after three years. Even if it is redefined as a serious crime by taking into account aggravating circumstances, such acts are statute-barred after 10 years.

5.12 The complainant adds that the application of time limits for prosecution also contravenes article 2 of the Convention which, according to the Committee's interpretation,[16] prohibits States from applying statutes of limitations to prevent the prosecution of crimes of torture. In the present case, although the non-applicability of statutory limitation to the crime of torture is enshrined in the new Tunisian Constitution, the State party has evaded its obligations under article 2 of the Convention by adopting a different definition of the acts in order to declare the offence statute-barred.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a complaint, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes that the State party has challenged the admissibility of the complaint, arguing that the complainant has not exhausted domestic remedies. In this regard, the Committee notes that: the complainant filed a criminal complaint, which was registered by the Public Prosecutor's Office of the Court of First Instance on 3 June 2011; that the trial began in April 2012; that a decision was handed down on 8 April 2015, three years later, declaring that the acts were statute-barred and not liable to prosecution (with the exception of the charges filed against former President Ben Ali); and that the complainant has appealed the decision, but the case has not been heard to date, with the next hearing scheduled for 20 October 2017. The Committee considers that the insurmountable procedural constraint imposed on the complainant by the inaction of the competent authorities has rendered the opening of proceedings conducive to a useful remedy highly unlikely.[17] In the absence of relevant information from the State party, the Committee concludes that the domestic proceedings have exceeded reasonable time limits. Accordingly, the Committee is not deterred from considering this communication by article 22 (5) (b) of the Convention.

6.3 As the Committee considers that there is no other obstacle to admissibility, it declares the complaint admissible and proceeds to its consideration of the merits.

[16] The complainant refers to general comment No. 3 (2012) on the implementation of article 14 by States parties, para. 40.

[17] See communication No. 291/2006, *Ali v. Tunisia*, decision adopted on 21 November 2008, para. 15.2.

Consideration of the merits

7.1 The Committee has considered the communication, taking due account of all the information provided to it by the parties, in accordance with article 22 (4) of the Convention.

7.2 The Committee notes that the complainant alleges that the State party has violated articles 1, 2 (1), 4, and 11 to 16 of the Convention.

7.3 With regard to the complaint relating to article 1, the Committee notes the complainant's allegations that he was subjected to acts of torture by officials of the State party, and that the latter failed to take all effective measures to prevent him from being subjected to such acts. The Committee notes, to begin with, that the complainant was arrested during the night of 29 and 30 July 1993 and taken to the Ministry of the Interior, where he was interrogated and arbitrarily detained for 20 days (see paras. 2.2 ff.). The Committee notes that the complainant provided a detailed account of the appalling torture that he suffered at the Ministry of the Interior, where the victim was subject to the control of national security officers, whom he identified and named. The Committee further notes that the complainant was repeatedly tortured, held in solitary confinement and deprived of medical care at 9 April Prison for lengthy periods despite an obvious need for care (paras. 2.11 ff.).

7.4 The Committee also notes that the complainant claims that he still suffers many physical and psychological after-effects of torture, and that he has submitted reports of relevant medical examinations (see para. 2.18). The Committee observes that the State party has not refuted any of these allegations. Under the circumstances, and on the basis of the information made available to it, the Committee concludes that the complainant's allegations must be taken fully into account; that the abuse to which he was subjected was perpetrated by officials of the State party in an official capacity; and that the acts in question constitute acts of torture within the meaning of article 1 of the Convention.

7.5 Having found a violation of article 1 of the Convention, the Committee will not address the complaints filed by the complainant, on a subsidiary basis, under article 16 of the Convention.

7.6 The complainant also invokes article 2 (1) of the Convention, pursuant to which the State party should have taken effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction. The Committee observes in this connection that the complainant was arrested without being presented with a warrant; that he was held in incommunicado detention at the Ministry of the Interior from 30 July to 4 September 1993, i.e. for 37 days, a period that greatly exceeds the maximum of four days authorized by law (see para. 2.7 above); that a review of the lawfulness of his detention was not conducted within the statutory time limit; and that during his pretrial detention he was denied contact with his family and the medical care required for his condition. Although he is a victim of acts of torture of extreme violence, which he repeatedly reported, the acts in question remain unpunished. Accordingly, the Committee concludes that there has been a violation of article 2 (1), read in conjunction with article 1 of the Convention.[18]

7.7 With regard to the alleged violation of article 4 of the Convention, the Committee recalls that one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished.[19] It also recalls that article 4 requires States parties to ensure that acts of torture are offences under its criminal law and to make such offences punishable by appropriate penalties which take into account their grave nature. The Committee notes that the present case has not yet been examined, more than 21 years after the events, with a view to prosecuting and punishing the alleged perpetrators of the torture inflicted on the complainant. The Committee also notes that, owing to the principle of non-retroactivity enshrined in article 101 bis, which criminalizes torture, the accused

[18] See, inter alia, communications, *Niyonzima v. Burundi*, para. 8.3, and No. 522/2012, *Gahungu v. Burundi*, decision adopted on 10 August 2015, para. 7.6.

[19] Communication No. 212/2002, *Urra Guridi v. Spain*, decision adopted on 17 May 2015, para. 6.7.

have been prosecuted for an offence entailing a maximum prison term of 5 years, despite the fact that the gravity of the evidence would have merited criminal charges entailing commensurate exemplary penalties. The Committee recalls in this connection its concluding observations, in which it expressed concern about the application of the principle of non-retroactivity of criminal law to acts committed prior to the introduction of the crime of torture into the amended Criminal Code of 1999 (under article 101 bis), and consequently recommended that the State party "take all necessary measures to ensure that acts of torture committed before 1999 are prosecuted as offences punishable by penalties commensurate with the gravity of the crime" (see CAT/C/TUN/CO/3, paras. 35 and 36). The Committee concludes that there has been a violation of article 4 (2) of the Convention.

7.8 The Committee also notes the complainant's argument that article 11 was violated because the State party failed to conduct the necessary oversight of his treatment at the time of his arrest and during his detention. In particular, he alleged that his arrest and detention were not accompanied by the requisite procedural safeguards and oversight; that he was deprived of medical care notwithstanding his critical condition; that he was repeatedly denied contact with his family; that he was not assisted by counsel during his pretrial detention; and that he was detained in deplorable conditions. In the absence of compelling evidence from the State party that provision was made for oversight of the conditions of detention of the complainant, the Committee concludes that there has been a violation of article 11 of the Convention by the State party.[20]

7.9 With regard to articles 12 and 13 of the Convention, the Committee notes with concern that, despite the registration of the complainant's complaint of torture in 2011 at the Court of First Instance in Tunis, the investigation was closed on 16 February 2012 without any effective investigation being undertaken, although almost 24 years have elapsed since the victim first reported the facts on appearing before the investigating judge at the end of his police custody on 4 September 1993.

7.10 Although the State party claimed that an investigation was opened, it failed to provide any details regarding the progress of the proceedings or the prosecution of the alleged perpetrators of acts of torture and ill-treatment. The Committee recalls the State party's obligation under article 12 of the Convention to ensure that its competent authorities proceed to a prompt and impartial investigation whenever there are reasonable grounds to believe that an act of torture has been committed.[21] Such an investigation should be prompt, impartial and effective.[22] In addition, a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of the persons who may have been involved.[23]

7.11 The Committee concludes that the State party failed to meet its obligation under article 12 of the Convention. It follows that the State party also failed to uphold its responsibility under article 13 of the Convention to ensure that the complainant had the right to complain to the competent authorities, who should respond in an appropriate manner by launching a prompt and impartial investigation.[24]

7.12 With regard to article 14, the complainant argued that the Tunisian State, having deprived him of criminal proceedings as set out above, deprived him, in addition, of the prescribed legal procedures for obtaining compensation for material and non-material damages due to serious crimes such as torture. The Committee further notes that the victim has not benefited from any rehabilitation measure for the severe physical and psychological after-effects that he continues to suffer and that have been categorically attested by medical examinations. The Committee therefore considers that the complainant has been denied his right to redress and compensation under article 14 of the Convention.

---

[20] See, for example, *Gahungu v. Burundi*, para. 7.7.

[21] See communications, *Niyonzima v. Burundi*, para. 8.4; and No. 500/2012, *Ramirez Martinez et al. v. Mexico*, decision adopted on 4 August 2015, para. 17.7.

[22] See communication No. 495/2012, *N.Z. v. Kazakhstan*, decision adopted on 28 November 2014, para. 13.2.

[23] See communications Nos. 580/2014, *F.K. v. Denmark*, decision adopted on 23 November 2015, para. 7.7; and 161/2000, *Djemail et al. v. Yugoslavia*, decision adopted on 21 November 2002, para. 9.4.

[24] See *Niyonzima v. Burundi*, para. 8.5.

7.13 With regard to article 15, the Committee has taken note of the complainant's allegation that the judicial proceedings instituted against him and the sentence to a prison term of 26 years were based on the record that he signed under torture. Notwithstanding his complaints, his allegations were never verified by the authorities and his confessions were not rendered null and void. The State party has not presented any argument capable of countering the allegation. The Committee recalls that the general nature of the provisions of article 15 of the Convention derives from the absolute nature of the prohibition of torture and therefore entails an obligation for each State party to ascertain whether or not statements forming part of a procedure under its jurisdiction were made under torture.[25] By failing to conduct the necessary investigations and by using such statements in the legal proceedings instituted against him, the State party violated its obligations under article 15 of the Convention.

8. The Committee, acting under article 22 (7) of the Convention, considers that the facts before it constitute violations of article 2 (1), in conjunction with article 1, and articles 4, 11, 12, 13, 14 and 15 of the Convention.

9. The Committee urges the State party: (a) to ensure that all acts of torture committed before 1999 are prosecuted as offences punishable by penalties commensurate with the gravity of the crime and to amend its criminal legislation to allow for such prosecution; (b) to complete the investigation into the events in question with a view to prosecuting all persons who may have been responsible for the treatment to which the complainant was subjected; (c) to provide the complainant with appropriate redress, including compensation for material and non-material damages, restitution, rehabilitation, satisfaction and guarantees of non-repetition; and (d) to take all necessary measures to prevent any threats or acts of violence to which the complainant or his family might be exposed, particularly as a result of having lodged the present complaint. In accordance with rule 118 (5) of its rules of procedure, the Committee requests the State party to inform it, within 90 days of the date of transmission of this decision, of the steps it has taken in response to the above findings.

---

[25] See communications No. 419/2010, *Kisoki v. Morocco*, decision adopted on 26 May 2011, para. 8.8; *P.E. v. France*, para. 6.3; and *Niyonzima v. Burundi*, para. 8.7.